

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of a Request for Review
By Eureka Broadband Corporation of Decision
of Universal Service Administrator

Federal-State Joint Board on
Universal Service

Changes to the Board of Directors of the
National Exchange Carrier Association, Inc.

CC Docket No. 96-45

CC Docket No. 97-21

**APPEAL OF DECISIONS OF THE UNIVERSAL SERVICE ADMINISTRATIVE
COMPANY CONCERNING EUREKA BROADBAND CORPORATION'S REVISION
TO FCC FORM 499-A AND APPLICATION OF CHARGES**

Pursuant to Section 54.713 of the rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 54.713, Eureka Broadband Corporation ("Eureka" or the "Company") as successor-in-interest to Gillette Global Network, Inc. ("Gillette" or "GGN") hereby respectfully requests that the Commission grant this request for an appeal of two decisions of the Universal Service Administrative Company ("USAC"). Specifically, Eureka is disputing a series of decisions by USAC, which would result in the application of a total of \$606,982.22 in Universal Service Fund ("USF") fees against Eureka. As explained herein in greater details, Eureka voluntarily approached USAC and the FCC to discuss the establishment of a payment plan (the "Voluntary Payment Plan") and to become fully compliant with its USF obligations pursuant to Section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254. Nevertheless, USAC has chosen to, during the payment plan discussions, reject the filing of revised 499A Forms and to impose fees on Eureka, which would result in a double recovery to the USF.

INTRODUCTION AND EXECUTIVE SUMMARY

Eureka is a New York City-based resale and facilities provider of telecommunications and internet services to enterprise customers in New York, New Jersey, Maryland, Virginia, and Washington, D.C. Eureka offers businesses a single source for voice communications services, high-speed Internet, managed security services and data networking solutions. Eureka Broadband Corporation was established in 1998 and since that year has acquired seven (7) companies including GGN in December 2000.

On May 10, 2004¹, Eureka submitted a retroactive filing of (on behalf of GGN) Form 499-As from 1999 through 2004 (representing revenues from 1998 through 2003) as well as the Voluntary Payment Plan proposal thereby initiating formal negotiations with USAC and beginning the process of working with USAC to identify its USF-based obligations. At the time Eureka submitted its Voluntary Payment Plan, the Company did not believe that GGN had previously filed any Form 499-As concerning revenue generated during the relevant time frame between 1998 and 2003. Therefore, in May of 2004, Eureka believed it necessary to submit the 499A Forms to come into compliance and commence the Payment Plan negotiation and acceptance process with USAC and the FCC.

During the payment plan negotiation process, however, Eureka received an automatically generated letter from USAC advising Eureka that the new, “revised” FCC Form 499-As for the reporting years 2000 and 2001 (1999 and 2000 revenues) were being rejected (“2000/2001 Revised Filing”). The stated basis for rejection of the “new”, revised form was the fact that, unbeknownst to any participants in the discussions at the time, GGN had, in fact, filed a FCC Form 499-A in 2000. Eureka only had the opportunity to review the aforementioned 499-A

¹ Copies of relevant correspondence between Eureka’s counsel and the Commission and USAC are attached hereto at Exhibit 4.

after the Company's initial document submission to USAC in May 2004. Upon review of the filing, Eureka deemed the revenue accounting calculations, utilized as the basis for the 499-A, to be completely erroneous. Unfortunately, the "refilling" of a "new" 499 Form, according to USAC, violated USAC's policy that a carrier has no more than one year after filing a 499A Form to submit any adjustments to its reported revenues. Furthermore, USAC rejected Eureka's new, revised 2001 Form 499-A based on the identical policy. In fact, GGN never filed a Form 499-A for 2001. USAC, nevertheless, chose to estimate an amount due from GGN based upon its 2000 Form 499-A filing. At the time of the automated rejection by USAC, counsel for Eureka was actively discussing and negotiating, in good faith, with USAC and the FCC, the terms and possible conditions associated with Eureka's Voluntary Payment Plan. Eureka operated during the negotiations under the belief that, as part of the ongoing negotiations, USF-eligible revenues reported in the rejected 2000 and 2001 Form 499-As, rather than the revenues reported by GGN, would form the basis for any final USF assessment calculations. Eureka and its counsel therefore believed that USAC's rejection of its 2000 and 2001 Form 499-As did not prejudice its proposed Voluntary Payment Plan, and that an appeal of these rejections was not necessary. This understanding changed on September 9, 2004, at a meeting between Eureka, its attorneys, and representatives of the Commission and USAC, in which Eureka was told that the USF-eligible revenues GGN reported, and USAC assessed for 2000 and 2001, respectively were considered by USAC to be part of the total USF liability calculations. This amount, \$250,373.23, which is the difference in USF-obligations Eureka may owe based on application of different revenue reporting is disputed by Eureka.

Second, Eureka also is seeking an appeal regarding an additional USAC decision concerning a disputed amount in the sum of \$296,200.10. This amount represents USF

payments made by Eureka through MCI, Inc. (“MCI f/k/a Worldcom”). During the relevant time-period, MCI served as Eureka’s underlying carrier and passed through the applicable USF charges to Eureka, which were paid by the Company. Accordingly, the implication of USAC’s decision is that the USF would receive a double payment based upon one, single revenue stream, which is facially contrary to applicable law, notions of basic equity, and public policy.

Finally, Eureka is disputing, and requests a decision by the Commission, concerning the penalties and fees of \$60,408.89, which USAC is attempting to impose on Eureka for USF fees that were previously unpaid by GGN. The imposition of these fees is arbitrary and capricious and are not reasonably tied to the costs that USAC has incurred, or may incur in the future, in collecting Eureka’s past due balance. In fact, Eureka came forward voluntarily to USAC in order to become fully compliant of all regulatory payments. USAC was spared the major expense and investment of valuable USAC and Commission resources to track down Eureka to obtain payment. Moreover, Eureka has, in full compliance with the Proposed Payment Plan guidelines, included interest payments at a rate of 9%, both in its Voluntary Payment Plan and in the payments made by the Company to date. By way of reference, between the time in which Eureka submitted its payment plan in May of 2004 and the date of this Appeal, Eureka has made payments to the USF totaling \$357,265.82. USAC’s application of late payment fees is entirely discretionary and due to the circumstances surrounding Eureka’s good faith efforts, these fees should not be assessed against Eureka.

Based upon the foregoing, and as is described herein, Eureka respectfully requests that: (1) the Commission reverse USAC’s decision to reject Eureka’s adjusted filing of Form 499A-s for the years 2000 and 2001; (2) reject USAC’s decision to impose USF-payment obligations based on previously contributed amounts paid by Eureka to its underlying carrier

MCI, and (3) reject USAC's discretionary decision to impose late penalties and fees against Eureka.²

BACKGROUND AND RELEVANT FACTS

GGN's original Form 499-A filing for calendar year 1999, which was due April 1, 2000, was filed on or about September 20, 2000 ("September 20, 2000 Filing"). As Eureka has now discovered, GGN's September 20, 2000 499 Filing contained errors most likely caused by GGN's incorrect revenue allocation. To that end, GGN inadvertently: (1) overstated its long distance revenues; and (2) understated its local revenues and enhanced services revenues. Unbeknownst to Eureka, GGN corrected the errors and attempted to file a revised Form 499-A on or about April 20, 2001 (the "Attempted First Revised Filing"). This filing was rejected by USAC. In 2001, USAC did not receive a Form 499-A from GGN, and therefore estimated 2000 revenues from the inaccurate September 20, 2000 Filing.

Notably, during 2001 and on a going-forward basis, GGN was providing its long distance services primarily on a resale basis, and was treated as an end user by its underlying carrier, MCI, for USF purposes. As a result of this type of arrangement, MCI was, in fact, recovering all, if not some amount in excess, of its USF charges from GGN, which GGN paid.³

As noted herein, on May 10, 2004, Eureka filed a Payment Plan Proposal and Form 499-As, reflecting revenues generated from 1998 through 2003. The forms were filed for three reasons: (1) to ensure Eureka was fully compliant with its regulatory payment obligations;

² The Commission has the authority to consider the decisions of USAC pursuant to Section 254 of the Act and Section 54.713 of the Commission's rules, 47 C.F.R. §54.713. *See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Federal-State Joint Board on Universal Service, Report and Order, 13 FCC Rcd 25058, 25093, 25095 at ¶¶ 69, 72 (1998) ("1998 Joint Board Order") ("We find that the Commission has the authority to review USAC decisions . . . because USAC is administering the universal service support mechanisms for the Commission, subject to Commission rules and oversight").

³ *See* September 20, 2000 filing, where GGN certified that had been contributing to the USF through its underlying carriers, attached as Exhibit 1.

(2) to provide USAC with information from which to formulate an amount that Eureka owed to the USF; and (3) to initiate discussions and negotiations between Eureka, USAC, and the FCC as part of the process of entering into a Voluntary Payment Plan for any outstanding USF balance. In accord with the process, USAC forwarded an Acknowledgement of this filing on May 15, 2004, with an estimate of Eureka's outstanding balance based upon these forms. Through its standard operating procedures, on June 10, 2004, USAC sent Eureka a standard form letter notifying Eureka that its 2000/2001 Revised Filing, which represented revenues generated in 1999 and 2000, was rejected from consideration. The other Form 499-As, representing the years 1998, 2001, 2002 and 2003 were filed concurrently and accepted for filing, as there was no Form 499-A from Eureka or a related entity on already on file for these periods.

From this point forward, Eureka and its attorneys, engaged in discussions with representatives of the Commission, and USAC to discuss terms of the Voluntary Payment Plan. Eureka maintained the belief that any question of whether the revised filings would be accepted by USAC – ultimately – would be subject to and governed by these negotiations. Eureka continued to believe that in conjunction with its good faith negotiations that USAC would accept the previously (and systematically) rejected 2000/2001 Revised Filing and therefore incorporated into the Voluntary Payment Plan. Based upon this belief, Eureka continued the negotiations in good faith, did not file an appeal of this decision with the Commission and awaited a response from USAC of the proposed Voluntary Payment Plan. On September 9, 2004, Eureka and its attorneys received absolute confirmation ,for the first time, that USAC intended to include in the proposed Payment Plan obligation revenue amounts derived from the erroneous 499 Form GGN filed in 2000 and from the estimated Form USAC created to represent a hypothetical 2001 Form fling by GGN Therefore, formal notification of the rejection of the

revenues, and the application of payments and penalties, occurred on September 9, 2004.

ARGUMENT

A. USAC SHOULD ACCEPT THE REVISED 2000/2001 FILINGS AND APPLY THOSE FILINGS TO EUREKA'S USF OBLIGATION ACCORDINGLY

USAC's response to Eureka's Revised 2000/2001 Revised Filing is inappropriate for a number of reasons: (1) USAC lacks statutory or any other authority to refuse to accept Eureka's revised submission; (2) USAC's action is inherently arbitrary and constitutes an abuse of discretion in the administration of the USF; (3) the result creates bad public policy; and (4) in the specific instance of the 2001 Form 499-A, this submission does not reflect a filing by GGN, which did not file for that year, or by Eureka, which the FCC rejected. Instead, it reflects only a projection of revenues created by USAC, based upon erroneous data from the GGN filing submitted in 2000. USAC should therefore accept the submissions in a manner similar to other filings made by Eureka for past years as described in the Voluntary Payment Plan.

1. USAC Lacks Authority To Impose A One-Year Limit That Precludes Parties from Submitting Evidence of an Overpayment

Section 254 of the Communications of Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), provides generally for the equitable and nondiscriminatory contribution by telecommunications carriers to mechanisms established by the Commission and the Federal-State Joint Board to preserve and advance universal service.⁴ Although its existence was not mandated by the Act, USAC was established at the direction of the FCC as an independent not-for-profit entity with the sole function of administering the

⁴ 47 U.S.C. §254.

Universal Service Fund (“USF”) and other universal service support programs.⁵

USAC does not possess any independent authority to create decisional or interpretative rules governing the USF programs. The Commission and the Federal-State Joint Board retain full authority and control over the USF programs, and USAC at all times remains subject to FCC oversight.⁶ The limited responsibilities delegated to USAC are clear in the rules and regulations setting forth the scope of USAC’s charter. Specifically, Sections 54.702(a) and (b) of the Commission’s rules clearly state that USAC is responsible for administering the USF programs, including billing, collection and disbursement of USF funds.⁷ In addressing early concerns over the role of USAC, the Commission has emphasized that USAC’s functions are to be “exclusively administrative”,⁸ noting that Section 54.702(c) expressly limits USAC’s power by stating that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”⁹

Despite the fact that USAC is clearly prohibited from establishing policy or addressing uncertainties in the administration of the USF on its own, it has clearly done so in this case. In rejecting Eureka’s request, USAC has relied on its “previously adopted policy,” approved by the USAC Board of Directors during a USAC Board of Directors meeting on July 27, 1999, limiting the period for carrier-initiated adjustments to USF submissions. According to

⁵ See *1998 Joint Board Order*, 13 FCC Rcd at 25064, 25065-66 at ¶¶ 12, 14.

⁶ See *In the Matter of Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9192 at ¶¶ 813-815 (1997) (“*1997 Joint Board Order*”); *1998 Joint Board Order* at 25065 at ¶ 14; see also 47 U.S.C. § 254, *et seq.*

⁷ 47 U.S.C. §§ 54.702(a)-(b).

⁸ *1998 Joint Board Order* at 25067 at ¶ 16 (*responding to comments of BellSouth, Sprint, and US WEST*).

⁹ 47 U.S.C. §§ 54.702(c).

an Action Item entitled, “Recommended Deadline for True-Up of Form 457,” USAC’s staff recommended the following to the Board:

“[b]eginning with the September 1, 1999, data submission; carrier initiated requests for changes in reported revenues be limited to 12 months Changes to prior submissions as a result of an audit of a carrier’s revenue reported on the Form 457 would not be impacted by the proposed limitation.”¹⁰

USAC’s staff offered the following rationale to support adoption of the recommendation:

“Historically, USAC has accepted any changes in revenue information reported by telecommunications service providers, regardless of when the changes were reported. It is becoming increasingly burdensome administratively to continue accepting revisions to reported revenue information indefinitely Each time a change is reported that affects end-user billed revenue, it necessitates revising the service provider’s billed amounts for the period impacted by the change.”¹¹

The adoption of such a policy is completely unauthorized and inappropriate.

First, if USAC’s one-year limit for acceptance of corrected USF filings is deemed to be justified and appropriate --which it is not-- such a limit was not properly adopted by USAC as an administrative policy. Rather, if such a rule should be properly adopted, it would require the Commission to follow its normal notice and comment rulemaking procedures. A one-year limit is more than a mere administrative or organizational measure. It is a decisional rule with potentially material adverse impact on contributors as well as on the USF as a whole. In Eureka’s case, the automatic imposition of USAC’s one-year limit clearly results in such a materially adverse impact, namely the disputed \$296,200.¹⁰ USAC’s adoption and imposition of such a rule, without public notice or comment that results in the confiscation of a carrier’s

¹⁰ The specific resolution stated, “RESOLVED, That the USAC Board of Directors directs staff to no longer accept carrier initiated requests for changes in revenues reported on prior FCC Form 457 beyond 12 months from the initial submission of the Form in question.” *See Action Item # aBOD05*, attached hereto as Exhibit 2.

¹¹ *See Action Item # aBOD05*.

property without just cause, violates of basic notions of due process under the Fifth Amendment of the U. S. Constitution.¹²

Second, USAC's one-year policy actually contravenes the rules that expressly contemplate that refunds will be given, without consideration of any time limit. Section 54.713 of the Commission's rules states that, "[o]nce a contributor complies with the Telecommunications Reporting Worksheet filing requirements, the Administrator may refund any overpayments made by the contributor, less any fees, interests, or costs."¹³ Therefore, contrary to USAC's implication, the Commission's regulations contemplate that USAC *will provide refunds* to contributors. Under such circumstances, USAC does not possess independent authority to thwart the clear intent of the rules by refusing to refund an overpayment, and, by extension, refusing to exclude the over-estimated amount from any remaining USF-balance attributable to Eureka.

Third, USAC's rationale for adopting the policy contradicts the rules that govern its operations. The one-year policy, adopted ostensibly to avoid an "administrative burden," ignores the provisions of Section 54.713 of the Commission's rules, which specifically permits USAC to receive compensation for administrative tasks. Because USAC is authorized to recover its costs for such tasks, arbitrary policies adopted to avoid the necessity for undertaking such tasks are completely unjustified.

Fourth, USAC attempts to support its position by stating to the Commission that:

¹² By contrast, we note that the Commission has used notice and comment procedures to adopt rules for refunds in other contexts, *e.g.*, in cases concerning refunds of filing fees paid by applicants for commercial broadcast licenses. *See In the Matter of Applications of Wade Communications, Inc., Ellen R. Evans d/b/a Heartland Communications, and B.R. Clayton and Martha S. Clayton d/b/a Middleton Radio*, Memorandum Opinion and Order, 16 FCC Rcd 20708, 20710 at ¶ 7 (2001). *See also In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15933, 15939 ¶¶ 32-33, 49 (1998).

¹³ 47 C.F.R. § 54.713

“We are unable to accept the revision because it was not filed within one year of the original submission.”¹⁴ Eureka notes the corollary – namely, that no Commission regulations *restrict* USAC from accepting a worksheet, nor do any Commission regulations govern the process by which it will accept, consider, or reject any worksheets filed out-of time. Thus, USAC is without discretion to reject a corrected worksheet, whenever it is filed. The same letter was also received in regard to the 2001 Form 499-A, even though GGN never filed a 2001 Form. Rather, USAC computed an amount it believed GGN owed, based upon the erroneous 2000 Filing.¹⁵

Finally, nowhere is there statutory or regulatory authority cited to support the USAC policy and nowhere is any indication given that USAC sought public comment or consulted with the Commission prior to adopting the policy. Thus, the adoption of, and reliance upon, such a policy directly violated the Administrative Procedures Act and contravenes express limits on USAC’s discretion.

2. USAC’s Policy is Arbitrary And An Abuse of Discretion

Even if USAC is deemed to have the authority to adopt policies concerning the filing of corrected worksheets, the particular policy at issue here is manifestly arbitrary and unfair. As such, it is a complete abuse of USAC’s discretion.

As an initial matter, USAC’s policy is striking in its asymmetry. USAC has limited a carrier’s ability to recover refunds, or adjust the reporting mechanism to accurately portray a contributor’s revenues, beyond a date certain, but has accepted no corresponding limit on its own ability to conduct audits, impose changes to reported revenues, and collect under-payments. It is simply inappropriate for USAC to have such unequal and limitless discretion to

¹⁴ Letter from USAC, dated June 10, 2004, Re: 2000 Form 499-A Revision Rejection.

¹⁵ Facsimile Cover Sheet from Michelle Tilton of USAC to Tadas Vaitkus of Eureka in regards to GGN filings, attached as Exhibit 3.

recover revenues from carriers, while imposing an apparently strict limit on the ability of carriers to obtain refunds.

USAC justifies its policy in part with the argument that there are few indicia of reliability in Form 499 revisions beyond the one-year deadline. However, USAC cannot have it both ways. If USAC feels confident that sufficient indicia of reliability exist for it to recover under-payments after a one-year period, it should possess the same level of confidence that reliable indicia exist to support identification of over-payments and refunds due to a carrier, as the Commission's rules contemplate.¹⁶

Absent a waiver, the USF programs are unjustly enriched. Such a result flouts the Commission's directive that USAC recover all funds due in an equitable and nondiscriminatory manner,¹⁷ and cannot be justified.

3. USAC's Decision Is Bad Public Policy

The Commission must not uphold USAC's decision because it will have negative implications for the contribution methodology underlying the USF program. To date, carriers have reported revenues subject to USF contributions with the understanding that if they over-report revenues and make excess contributions, the opportunity will exist to receive consideration for the amounts over-estimated.¹⁸ To be sure, carriers have the incentive to be as accurate as possible in their filings, but as is evident from Eureka's case, unintentional and unforeseen mistakes inevitably will occur. If USAC's position prevails, carriers would not be

¹⁶ By analogy, the United States Internal Revenue Code permits taxpayers to file any claim for a refund within three years, 26 U.S.C. § 6511(a); and correspondingly subjects the Internal Revenue Service ("IRS") to a general three year statute of limitations for filing suit for a deficiency assessment, 26 U.S.C. § 65019(a).

¹⁷ *See generally*, 47 U.S.C. § 254.

¹⁸ *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T, Report and Order and Order on Reconsideration*, 16 FCC Rcd 5748, 5733 at ¶12 (2001).

confident that USAC will fairly address and resolve such honest mistakes.

Most critically, the unchecked implementation by USAC of its policy limiting the revision of 499-A Forms may lead to substantial over-collection of USF contributions. In the case of Eureka, who came forward to USAC to meet its outstanding obligations, the over-estimation based upon the 2000 Form filed by GGN and the Estimate of the 2001 revenues would constitute a significant sum over the amount Eureka actually owes based on its actual revenues. On a cumulative basis over time, and in cases involving additional carriers, distortions in the amounts collected will be even greater. USAC has offered no explanation of whether or how adjustments will be made for such distortions. The implications of USAC's policy are that over-collections and over-estimations left without correction for more than a year will simply be retained without any adjustment. The indefinite retention of such over-collections and over-estimations is not authorized, and would threaten the integrity of the USF program and may place a chilling effect on other contributors who have been remiss in contributing properly to the USF from coming forward to meet their obligations, as Eureka has in this case.

4. Eureka's May 10, 2004 Filing of a 2001 499-A Form Should be Accepted for Filing

GGN never filed a Form 499-A, in 2001, to account for its 2000 revenues and therefore was not billed properly by USAC.¹⁹ Moreover, the USAC Administrator billed GGN in 2001 based upon an estimate of its 2000 revenues driven by the previous year's filing, an action, which was well within Commission Regulations.²⁰ With this action, there is the

¹⁹ Facsimile Cover Sheet from Michelle Tilton of USAC to Tadas Vaitkus of Eureka in regards to GGN filings, attached as Exhibit 3.

²⁰ Under §54.709(d) of the C.F.R. the USAC Administrator shall bill a contributor "based upon data the Administrator has available, including, but not limited to, the number of lines presubscribed to the contributor and data from previous years, taking into consideration any estimated changes in such data."

implication that this action can be undone upon proper filing of the outstanding Form 499-A by the contributor.²¹ This principle should extend to Eureka's case as well.

In this instance, Eureka has been negotiating in good faith on its Voluntary Payment Plan. During this process, Eureka filed what it believed to be all previously un-filed Form 499-As, including the 2001 Form 499-A. This was necessary for USAC to determine Eureka's amount due and negotiate a Voluntary Payment Plan. All of these previously un-filed Form 499-As were accepted by USAC, except for this particular one. This 2001 Form 499-A was rejected because the USAC Administrator had already assessed an amount to GGN for 2000. USAC argues that GGN *constructively* filed its 2001 Form 499-A. Therefore, under USAC's administratively unsound one-year policy, the Company was unable to adjust the amounts downward. If GGN had paid this invoice, the rules state that GGN would have been able to seek a refund of the overpayment. Extending this principle to the case here, Eureka should be allowed to receive the same benefit of having the amounts in the revised 2001 Form 499-A calculated as part of any remaining USF-balance which may be attributable to Eureka.

B. EUREKA HAS NO OBLIGATION TO REPAY AMOUNTS THAT HAVE BEEN PAID TO UNDERLYING CARRIERS INCLUDED IN ITS CURRENT OBLIGATION

MCI considered GGN, and later Eureka, an end user for purposes of USF collection. As such, MCI passed through USF charges to GGN, who paid them. Therefore, GGN understood that many of its USF obligations were already being met through their payments to MCI and stated accordingly on its 2000 499-A that was filed on September 20,

²¹ See §54.713 C.F.R., stating, "Once a contributor complies with the Telecommunications Reporting Worksheet filing requirement, the Administrator may refund any overpayments made by the contributor..."

2000.²² These payments were made to MCI with a good faith belief that they were indeed going to USF on GGN's behalf.

During the course of the negotiations of this Voluntary Payment Plan, Eureka was told that any payments made to MCI were not going to be deducted from the outstanding balance and must be included as part of the Voluntary Payment Plan, and that Eureka's recourse for recovering these moneys was to seek repayment from MCI. There is nothing in the rules that allows for a claim of this nature between carriers. Further, USAC's policy in this regard adds additional unfair costs to the carriers who are caught in this position, by forcing them to incur litigation costs on a matter that can be resolved through a simple accounting cost adjustment.

Finally, USAC's position that Eureka should seek refunds from MCI is inherently inequitable. MCI has already *remitted* the USF payments to the fund. If Eureka now pays the same amounts into the fund, there will be by definition a double payment by carriers and an over-recovery by USAC. At the same time, USAC's one-year limit on accepting revisions to 499-A Forms effectively would prevent MCI from obtaining a refund from USAC, thereby ensuring that the double payment into the fund could not be remedied. This would be, of course, an inequitable and illogical result.

It would be inequitable to force Eureka to make an additional payment of these revenues to USF, when it is MCI that took on the responsibility for this burden by treating GGN as an end user, and collecting and remitting USF payments. Further, there is no mechanism in

²² See Exhibit 1, the 2000 499-A, filed on September 20, 2000, Block 603, "Gillette Global Network, doing business primarily as a long distance reseller, has been contributing to the universal service fund [sic] through underlying carriers." In addition, GGN certified in the same block that it was exempt from contributing to Universal Service based upon this relationship with its underlying carrier. Further, this language also appears on its first attempted revision that was filed on April 28, 2004 that USAC rejected.

place to facilitate such a refund of these revenues.²³ Hence, the amount of \$296,200.10 should be removed from the amount subject to any outstanding USF balance, which may be applied to Eureka.

C. USAC MAY NOT UNJUSTLY IMPOSE DISCRETIONARY CHARGES AGAINST EUREKA

Eureka contacted USAC to bring itself into compliance with the USF earlier this year. Eureka understood that it owed USAC for USF fees from its succeesee in interest, GGN, dating back to 1998. Under 47 C.F.R. §54.713, the USAC Administrator “may bill a contributor a separate assessment for reasonable costs because of that contributor’s...late payment of contributions.” Clearly, this assessment of the fee is discretionary, and tied to compensating USAC for costs associated with recovering these revenues for USF. In this case, however, Eureka came to USAC to account for its past, and come into compliance with its obligations. USAC did not have to seek out Eureka, nor did USAC have to commence collection proceedings against Eureka, and therefore likely expended no costs in order to receive these past due amounts from a company USAC likely did not know existed.²⁴ USAC has offered no explanation for these fees, other than they are late payment and late filing fees.

In fact, under the terms of the proposed Voluntary Payment Plan, Eureka will be paying an additional nine percent (9%) interest on the undisputed principal amount due to USAC. This interest charge will amount to approximately the same amount of money as USAC is seeking to recover as late payment and late filing fees. To allow USAC to recover both the interest and the late payment and late filing fees which would result in USAC receiving

²³ For illustrative purposes, if a party overpays a vendor for the tax on an item subject to sales tax, that party may petition to receive a refund from the applicable state tax authority, who is receiving the benefit of that windfall, rather than from the vendor itself. No such analogous process exists at USAC. *See*, by example, NY Tax Law §1139 (a).

²⁴ At the beginning of the process, a search was conducted for Form 499 Filer Identification Numbers for GGN and Eureka. GGN’s lapsed in 2002, due to inactivity, and Eureka did not have one.

unjustified amounts of Eureka's funds

A finding that USAC is required to assess interest and late fees in every instance in which a carrier negotiates a payment plan will have the ultimate effect of further damaging the USF. The negative consequence of upholding such a decision is that it will likely discourage other carriers from coming forward to meet their obligations to USAC. USAC should not collect a windfall of interest payments, late payment and late filing fees, especially in this case where there is insufficient cause. Here, where no extensive Commission nor USAC resources were expended to determine the possible existence of Eureka's past due contributions (Eureka was unknown to USAC in May of 2004), it was Eureka who actually incurred significant administrative costs as part of evaluating the extent of its obligations prior to May 2004.

Therefore, USAC's one-year policy and its decision in the current case undermine the confidence that USAC operates solely as a functional administrator. Indeed, they raise important concerns that USAC may overstep the bounds of its limited responsibilities and make decisions with unauthorized substantive impact, thereby potentially impeding, rather than facilitating, the ultimate realization of the USF program's laudable goals.

As a further matter, Eureka paid a portion of the outstanding USF debt it owes through its underlying carrier during the relevant period, MCI, and should not be forced to pay this amount twice. Similarly, Eureka should not be forced to pay late payment and late filing fees on its obligations to USAC. As a result of USAC's decisions in this regard, USAC and the USF would receive unjust enrichment if it is allowed to collect late fees intended to compensate USAC, as an Administrator of the Fund, for costs in securing revenues from carriers, like Eureka, who have lapsed in their payment obligations, but have since come forward of their own accord to USAC in order to achieve full regulatory and payment compliance.

CONCLUSION

In light of the foregoing, Eureka respectfully requests that the FCC reverse USAC's decisions and direct USAC to remove from consideration the disputed amount of \$606,982.22 as applied to Eureka's USF balance.

Respectfully submitted,

/s/ Jonathan E. Canis /s/

KELLEY DRYE & WARREN LLP

Jonathan E. Canis
Darius B. Withers
1200 19th Street, N.W. Suite 500
Washington, D.C. 20036-2423
202-955-9600 (voice)
202-955-9792 (facsimile)

Counsel to Eureka Broadband Corporation

Dated: September 30, 2004

Exhibit 1

September 20, 2000 Filing

Exhibit 2

USAC Board of Directors Minutes

Exhibit 3

Facsimile Cover Sheet From Michelle Tilton

Exhibit 4

Relevant Correspondence from Eureka's Counsel to the Commission and USAC